

STATE OF MICHIGAN
COURT OF APPEALS

CAMILLA ANN DOWSWELL,

Plaintiff-Counterdefendant-
Appellee,

v

DANIEL ROY DOWSWELL,

Defendant-Counterplaintiff-
Appellant.

UNPUBLISHED

June 5, 2001

No. 221929

Kalamazoo Circuit Court

LC No. 98-002866-DO

Before: Talbot, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

In this divorce action, defendant appeals as of right the trial court's denial of his request for attorney fees and costs after judgment of divorce was entered. We affirm.

Defendant argues that he was entitled to attorney fees and costs because he was unable to bear the expense of the divorce action and plaintiff has the ability to pay. Defendant argues that the trial court abused its discretion by refusing to order plaintiff to pay his attorney fees and costs.¹ We disagree.

We review a trial court's denial of a requested award of attorney fees and costs in a divorce action for an abuse of discretion. *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997); *Kurz v Kurz*, 178 Mich App 284, 297; 443 NW2d 782 (1989). An abuse of discretion is found only in extreme cases where "the result is so palpably and grossly violative of fact and logic" that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion. *Michigan Dep't of Transp v Randolph*, 461 Mich 757, 767-768; 610 NW2d 893 (2000).

"A court may award a party in a divorce action 'any sums necessary to enable the . . . party to carry on or defend the action, during its pendency.'" *Hawkins, supra* at 669, quoting MCL 552.13(1); MSA 25.93(1). See also MCR 3.206(C)(2); *Maake v Maake*, 200 Mich App

¹ On appeal, defendant seeks \$15,000 in attorney fees and costs, as well as an additional \$5,000 in attorney fees and costs for bringing this appeal.

184, 189; 503 NW2d 664 (1993). A party may not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support. *Id.* An award of attorney fees may also be warranted when the party requesting payment has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation. *Hawkins, supra* at 669, citing *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). MCR 3.206(C) provides that a party requesting attorney fees and expenses in a divorce action "must allege facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay."

Defendant failed to allege sufficient facts regarding the parties' respective abilities to pay defendant's attorney fees. Although defendant asserted in his petition that he had a "bad back which prevents him from doing some sort of employment," he made no allegations therein regarding plaintiff's ability to pay. Notably, the record establishes that defendant had paid \$9,541.40 in attorney fees before the trial began. This fact belies defendant's claim that an award of attorney fees was *necessary* to enable him to defend the action. Further, the trial court placed some emphasis on defendant's failure to take advantage of his own income-earning abilities and responsibilities. The substantial difference in the parties' current incomes, defendant's \$100 per week and plaintiff's \$5,675 per month, was at least in part due to defendant's decision to attend college on a full time basis. We conclude that the record supports the trial court's finding that defendant is able to pay his attorney fees and costs.

Defendant also contends that his share of the marital estate lacks the liquidity to enable him to pay his attorney fees and costs. The relative liquidity of the assets received by the parties is properly considered in determining whether to award attorney fees and costs. *Kurz, supra* at 297-298. The trial court's division of property suggests that plaintiff's share of the marital estate is primarily comprised of non-liquid assets: the marital home, a life insurance policy, and her share of various retirement benefits. In contrast, defendant's share of the marital estate included the most liquid assets—all of the savings bonds and his workers' compensation settlement. Thus, we do not believe that the liquidity of the assets awarded to the parties supports defendant's contention that he was entitled to attorney fees. Based upon the record, we cannot conclude that the trial court abused its discretion in denying defendant's request for attorney fees.

In addition, defendant's reliance on *Hanaway v Hanaway*, 208 Mich App 278; 527 NW2d 792 (1995), is misplaced. In *Hanaway*, this Court determined that the trial court erred in denying the plaintiff's request for attorney fees. *Id.* at 299. Importantly, this Court also reversed the trial court regarding alimony and property division issues. *Id.* In so doing, this Court expressly advised that an award of attorney fees would be inappropriate if the trial court's revised order left the parties with comparable income and assets. *Id.* In the instant matter, defendant does not formally challenge the trial court's distribution of the marital estate or the award of \$250 in weekly spousal support.² Moreover, the parties did not have any income-producing

² Defendant does make arguments which implicitly challenge the trial court's disposition of the marital estate; however, defendant does not raise this issue as one of his questions presented. Generally, issues that are not listed in the statement of questions presented have not been properly presented; in fact, review of such an issue on appeal is inappropriate. *Hilliard v Schmidt*, 231 Mich App 316, 318; 586 NW2d 263 (1998).

assets. Thus, defendant is not at risk of having to invade the principal of such assets to pay his attorney fees.

Finally, we agree with the trial court's conclusion that neither party's conduct was so egregious as to alone merit an award of attorney fees. See *Stackhouse, supra* at 445. We conclude that the trial court did not abuse its discretion by denying defendant's request for attorney fees and costs. Accordingly, we need not address the reasonableness of the attorney fees sought.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Jane E. Markey